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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MARC GILBERT DOGGETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

(1) Where taken together, three of the four factors set forth in Barker v. Wingo, 407 U.S. 514 (1972), weigh in favor of the accused, should an additional mandatory requirement of actual prejudice be imposed in order for the accused to prevail on a claim that his right to a speedy trial has been violated; and

(2) Has Moore v. Arizona, 414 U.S. 25 (1975), which holds that an affirmative demonstration of prejudice is not required, been reversed?

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The petitioner, Marc Gilbert Doggett respectfully prays that a Writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on July 19, 1990.

OPINION BELOW

The Court of Appeals affirmed the district court's ruling on July 19, 1990, with opinion and a separate dissent. United States v. Doggett, 906 F.2d 573 (11th Cir. 1990) (See Appendix C). A timely petition for rehearing was denied on September 12, 1990. (See Appendix D).

JURISDICTION

The opinion with dissent by the United States Court of Appeals for the Eleventh Circuit was entered on July 19, 1990. A timely petition for rehearing en banc was denied on September 12, 1990. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation of the speedy trial provision in the Sixth Amendment to the United States

Constitution, which provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

STATEMENT OF THE CASE

The petitioner, Mr. Marc Gilbert Doggett, is thirty-three years old, married, and gainfully employed. For the past seven years, he has lived continuously, openly and honestly in the Reston, Virginia area under his true name while working, voting, going to school, and paying taxes. Mr. Doggett met his wife, Delores Doggett, in the fall of 1982, and married her in October, 1983, in Reston, Virginia, where they have resided since.

Mr. and Mrs. Doggett have never concealed their identities. Since his marriage in 1982, Mr. Doggett has never

been in any kind of legal trouble, with the exception of minor traffic tickets. Mr. Doggett is a registered voter, has a Virginia driver's license, has several credit cards in his name, and files federal income tax returns. In short, there is no evidence that he has ever sought to conceal his identity or avoid detection, and indeed no evidence that Mr. Doggett ever knew that there was an indictment issued against him.

Unbeknownst to the petitioner, he had in fact been indicted in 1980 for alleged peripheral involvement in a cocaine distribution conspiracy. On February 22, 1980, the petitioner was indicted in the United States District Court for the Middle District of Florida, Jacksonville Division, on charges of conspiracy to import cocaine in violation of 21 U.S.C. 963 and

conspiracy to distribute cocaine in violation of 21 U.S.C. 846. That same day, a warrant for the petitioner's arrest was issued. It was not executed, however, until September 5, 1988, some eight and a half years later.

Immediately upon issuing the arrest warrant to the United States Marshal's Office in 1980, Agent Douglas Driver of the Drug Enforcement Agency, the case agent who had conducted the investigation of petitioner, sent a memorandum to the United States Marshal's Office indicating that the Drug Enforcement Agency would handle the arrest. That memo had the intended effect of taking the petitioner's name out of the Marshal's system until further notice, thus relieving the Marshal's office from any responsibility for arresting the petitioner.

Twenty-six days after the issuance of the arrest warrant, Agent Driver had an agent of the North Carolina State Bureau of Investigation, Agent Charles Overton, and Officer Larry Rawlins of the Wake County Beverage Control Office, go to the petitioner's parents' house in Raleigh, North Carolina to arrest him.

On March 18, 1980, Agent Overton interviewed petitioner's mother, Leonor Pinzon Doggett. Mrs. Doggett informed the agent that her son had left home the previous Friday, March 14, 1980, and gone to Miami to get a renewal of his passport and from there was going to fly to Colombia with his cousin. Mrs. Doggett was extremely cooperative with the agent, and even told him her son's departure flight number from Miami. Upon the agent's departure, Mrs. Doggett never told the petitioner of the agent's

visit, nor did she tell anyone in the family.

On March 18, 1980, Agent Driver issued a teletype to all United States Customs stations, EPIC and INTERPOL, stating that Marc Gilbert Doggett was wanted in connection with the indictment. These entries into these United States computers were cancelled six weeks later on May 2, 1980. Agent Driver testified that he did not request the cancellations and only "guessed" that the system had a standard procedure to cancel the entries out after a certain number of days.

On that same day, Agent Driver issued teletypes to the United States Customs stations, EPIC and INTERPOL stating that Mark Gilbert Doggett was wanted in connection with the indictment. Agent Driver did not

however, enter the petitioner's name into the National Crime Information Center computer, the primary law enforcement computer system, until April 2, 1981, over a year later. The agent testified that he did not enter the name until that date because he erroneously assumed that his prior teletypes got the petitioner into all law enforcement computer networks.

The next event in the chronology occurred in September, 1981, when Agent Driver learned that the petitioner had been arrested in Panama on a cocaine charge. Agent Driver contacted DEA Agent Williams, who at that time was the DEA agent in charge of Panama. Agent Driver testified that Agent Williams told him that he had made an informal request to the Panamanian Government to release the petitioner to the United

States. No written confirmation of this informal request for release or expulsion was produced in the record below. No request for extradition under the formal extradition treaty existing between the countries was ever invoked or utilized.

For the next three years, Agent Driver made periodic reports to his file on the state of the apprehension of the petitioner. In each DEA-6 report, the first of which was dated January 6, 1984, the second July 18, 1984, and the third March 10, 1985, Agent Driver erroneously reported that the petitioner was still in jail in Panama. The reports were based solely on Agent Driver's assumption that the petitioner was still in a Panamanian jail, and were not supported by any investigation conducted by the agent. The sole basis

for Agent Driver's belief that the petitioner was in Panama was his unsupported assumption that when American citizens are incarcerated in Panama, they generally serve lengthy sentences.

The petitioner's parents were notified by the State Department of his Panamanian incarceration. The petitioner's mother made one visit to him, and sent him money to help him survive the extreme conditions of the Panamanian jail. Further, the petitioner was regularly visited by personnel from the State Department of the United States in Panama.

In August 1985, Agent Driver was transferred to Panama, and learned that the petitioner had in fact been released in July, 1982. At this point, Agent Driver assumed that the petitioner knew

of the indictment, had left Panama for Colombia, and was still located in South America. This assumption was erroneous. Although the State Department in Panama knew of the release, the DEA, which was located only two blocks away from the State Department, did not know until August 1985.

Agent Driver never recontacted the petitioner's parents. The petitioner was never entered into FCIC, the Florida criminal history computer network, even though the indictment was issued in Florida. Agent Driver never performed a check of driver's license records. Nor did Agent Driver communicate to other agencies that the petitioner was under indictment. Agent Driver never performed a routine credit bureau check. Although Agent Driver had a belief that the petitioner had gone to Colombia, no

effort was ever conducted to extradite him from that country through the extradition treaty there.

By 1985, the DEA in Panama no longer even maintained a file on the petitioner, apparently due to the agency's policy of destroying inactive files. The United States Customs Office was not notified to watch for the petitioner as he entered the country; the only documentation that agency ever had regarding the petitioner was a secondary search request which had been cancelled in May, 1980. Agent Driver's efforts from 1981 onward consisted of periodic checks of the Jacksonville DEA file to see if the case was still active.

When Mr. Doggett was released from Panamanian captivity in July, 1982, he went to Colombia, staying briefly with an elderly aunt, teaching English

classes and recuperating from his weakened condition. On September 28, 1982, just three months after his release from the Panamanian jail, petitioner returned to the United States on his passport in his true name through customs at JFK Airport in New York, completely unaware of the indictment. He lived for the next few months in North Carolina at his grandmother's home. During that period, he met his wife and settled into the open, stable, and productive life he has led for the ensuing seven years. During that time, he lived under his true name and made no effort to conceal his identity or whereabouts.

The petitioner's arrest occurred as part of a program called WANT II, in which the Marshal's service made a check of all warrants and contacted the agency

responsible to see if the warrant had been served. WANT II commenced in September, 1988, and the petitioner was located by the Marshal's service through a credit bureau check within thirty minutes of commencing the search. Within minutes, the Government learned his driver's license number, the make and tag number of his vehicle, his wife's name, his employer, and his address.

The petitioner was arrested on September 5, 1988. He was arraigned September 20, 1988. On October 11, 1988, the he filed a Motion to Dismiss for Sixth Amendment Speedy Trial Violation. On October 24, 1988, the petitioner filed his Request for Production of Documents, seeking documents regarding the Government's efforts to locate the petitioner.

On December 14, 1988, the magistrate held a hearing on petitioner's Motion to Dismiss and on December 27, 1988, entered a Report and Recommendation recommending that the motion to dismiss be denied. [See Appendix A]. The petitioner filed timely Objections to the Magistrate's Report and Recommendation. On January 31, 1989, the district court entered its order denying the petitioner's motion to dismiss for speedy trial violation, and accepted the Magistrate's Report and Recommendation. [See Appendix B]. On February 3, 1989, the petitioner entered into a plea agreement reserving the right to appeal the dispositive issue of the speedy trial violation. At sentencing on March 31, 1989, the petitioner was sentenced to three years of probation and a $1,000 fine. A

timely Notice of Appeal was filed April 3, 1989 and an appeal taken pursuant to 28 U.S.C. §1291. The Court of Appeals for the Eleventh Circuit affirmed petitioner's conviction with one judge dissenting. A timely motion for rehearing was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN BARKER v. WINGO, 407 U.S. 514 (1972); SMITH v. HOOEY, 393 U.S. 374 (1969); MOORE v. ARIZONA, 414 U.S. 25 (1973); AND UNITED STATES v. LOUD HAWK, 474 U.S. 302 (1986).

In Barker v. Wingo, 407 U.S. 514 (1972), this Court provided the framework for analysis of Sixth Amendment speedy trial violations. The Court provided four factors to be considered, among others, in determining

a Sixth Amendment constitutional violation:

> (1) The length of the delay;
> (2) The reason for the delay;
> (3) nature of the defendant's assertion of his right to a speedy trial; and
> (4) the prejudice caused to the defendant as a result of the delay.

Id. at 530-533. Since the four factors are to be balanced, this Court found, no single factor is dispositive. Id. at 533. In Moore v. Arizona, 414 U.S. 25 (1973), this Court held that an affirmative demonstration of prejudice to the accused was not essential to prove the denial of his constitutional right to speedy trial, prejudice to the accused being only one of the factors for consideration. Id. In its opinion below, however, the Eleventh Circuit in effect ignored this Court's opinions in Barker and Moore by holding that an affirmative showing of prejudice is

always required, even where the other three factors weigh in favor of or are neutral to the accused.

Further, in violation of the dictates of Smith v. Hooey, 393 U.S. 374 (1969), the Eleventh Circuit found a "deliberate" delay on the part of the Government (906 F.2d at 579), yet failed to apply this Court's requirement that the State "discharge its constitutional duty to make a diligent, good faith effort to bring [an accused to trial]." 393 U.S. at 383. The Eleventh Circuit thus ignored the constitutional impact of this deliberate delay, as required by this Court.

Finally, the Eleventh Circuit failed to properly allocate the burden of proof on the delay which it found to be presumptively prejudicial. 906 F.2d at 578. Although the court found that

the 8-1/2 year delay was "presumptively prejudicial," the court allocated to Mr. Doggett the burden of proving actual prejudice. The court stated:

> Doggett's assertion that the defendant does not bear the burden of establishing prejudice when the other three factors do not weigh heavily against the Government is erroneous. The Eleventh Circuit has consistently placed that burden on the defendant. See e.g., Rainstaff, 885 F.2d at [183] (defendant must "prove prejudice" unless three factors weigh heavily against Government then (Mitchell, 769 F.2d at 1548) (defendant "must show actual prejudice" unless three factors weigh heavily against Government); Dennard, 722 F.2d at 1513 (defendant must "demonstrate actual prejudice" unless three factors weigh heavily against Government).

Id. (citations omitted). This allocation of the burden of proof is not supported by this Court's Sixth Amendment analysis, and in fact, violates the dictates of Moore v. Arizona and Barker v. Wingo, in which

this Court clearly evinced its intent that no single factor be dispositive.

The Eleventh Circuit's opinion in this case, which is in accord with a line of Eleventh Circuit cases holding that the defendant must bear the burden of establishing prejudice when the other three factors do not weigh heavily against the Government, is contrary to this Court's precedent, as well as the Sixth Amendment right to speedy trial. This right essentially guarantees that where an accused person is never informed of the charge against him, the Government may not delay its efforts for any reason, for an indefinite and potentially infinite period, and still bring the charge against the accused unless he or she can prove actual prejudice to the defense of the case. This result obviously conflicts with

this Court's rule in Barker and Moore v. Arizona, as well as the intent of the Sixth Amendment right to speedy trial.

The dissenting opinion by Judge Clark states in part:

> I agree with the majority that Doggett cannot show any concrete examples of how he was prejudiced. Nevertheless, as Barker clearly holds, the showing is not "necessary" to make out a speedy trial clause violation. 407 U.S. at 533, 92 S.Ct. at 2193. The defendant cannot always show all of the prejudice he faces when the Government waits over eight years to bring him to trial. As Justice Powell noted in Barker:
>
> > There is also prejudice if defense witnesses are unable to recall accurately events of the faded past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. Id. at 532, 92 S.Ct. at 2193. This unprovable prejudice is one of the reasons why the majority mechanistic approach is inconsistent with the sixth amendment guarantee.
>
> 906 F.2d at 583.

With respect to the other factors set forth in Barker v. Wingo, Judge Clark noted:

> There are other circumstances in this case which should be taken into account in determining Doggett's entitlement to relief. Because Doggett did not know he was indicted until he was arrested in 1988, he could not assert his right to a speedy trial earlier. In this case, Doggett has been leading a "normal, productive, and law-abiding life" since his return to the United States. Id. at 577. It is reasonable to expect that after a certain point in time one will not have to answer for actions taken in the past. Generally, this protection is provided by the five-year statute of limitations in which "Congress has codified the policy that a person need not remain indefinitely in jeopardy for allegedly illegal acts." See United States v. Mitchell, 769 F.2d 1544, 1547 (11th Cir. 1985) (apply 18 U.S.C. §3282). While the fact that the defendant does not learn about the charges until after the limitations period has expired, does not automatically amount to a speedy trial violation, it is "another factor" that should be taken into account. Id. at 1547, 1548.
>
> Id.

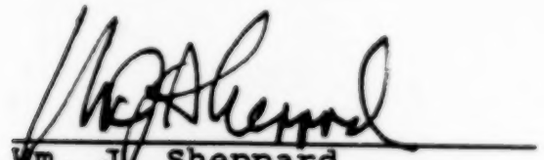
Rather than engaging in the "difficult and sensitive balancing process," described in Barker, the Eleventh Circuit applied a rigid rule, and foreclosed consideration of relevant factors present in this case. The Eleventh Circuit thus ignored long-standing principles laid down by this Court with respect to the analysis of speedy trial violations.

This Court should therefore grant certiorari to review and correct this misapplication of the Sixth Amendment constitutional dictates of this Court.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be granted.

Respectfully submitted,



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